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Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-448

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT,

Petitioner

v.

CHARLES M. GRAY,

Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Charles M. Gray, asks leave to proceed in forma pauperis pursuant to Rule 46.

Respondent's affidavit in support of this motion is attached hereto. Respondent was permitted to proceed in forma pauperis in the Supreme Court of Connecticut by an order of the Superior Court of Connecticut dated October 29, 1982.

RESPONDENT
CHARLES M. GRAY

BY G. Douglas Nash

G. DOUGLAS NASH
Chief Public Defender Office
121 Elm Street
New Haven, CT 06510
Counsel for Respondent

October 10, 1986

NO. 86-448

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF CONNECTICUT,

Petitioner,

v.

CHARLES M. GRAY,

Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

AFFIDAVIT IN SUPPORT OF MOTION FOR

LEAVE TO PROCEED IN FORMA PAUPERIS

I, Charles M. Gray, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed in this case without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? No. I was last employed in April, 1986, when I received approximately $80.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes. The total income I received from working in full-time or part-time jobs during the last twelve months is approximately $2000.00.

3. Do you own any cash or checking or savings account? Yes. I have approximately fifty dollars in cash.

4. Do you own any real estate stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes. I own a 1978 Cadillac worth approximately $1000.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons. My mother, Cleo Gray, and my six-year-old son, Tyson Gray.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

CHARLES M. GRAY

SUBSCRIBED AND SWORN to before me this 8th day of October, 1986.

SONIA P. FRANCIS
Notary Public, State of New York
Qualified in Bronx County
No. 4823351
Commission Expires March 30, 1988

NO. 86-448

IN THE

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STATE OF CONNECTICUT,

Petitioner

v.

CHARLES M. GRAY,

Respondent

OCTOBER TERM, 1986

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WILL A WRITTEN WAIVER OF A SUSPECT'S FIFTH AMENDMENT RIGHTS EXECUTED AT OR NEAR THE END OF HIS INTERROGATION BY POLICE NECESSARILY RENDER HIS STATEMENT TO POLICE ADMISSIBLE WHERE OTHER CIRCUMSTANCES DO NOT SUPPORT A FINDING OF A VALID WAIVER?

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OPINIONS BEL

In addition to the opinion Connecticut Supreme Court, reported at 200 Conn. 523, A (1986), and the oral ruling of the state trial judge ed in the Petitioner's Appendix, pp. 23A-25A, the unrepo itten memorandum of the trial court's decision to suppre arlier alleged statement by the respondent is also releva his case and has been reprinted in the Respondent's Ap p. 1A.

JURISDICTION

The jurisdiction of this Court, set forth in the petition, is conceded by the respondent.

STATEMENT OF THE CASE

A. Introduction

In this case the Connecticut Supreme Court held that a written waiver of a suspect's fifth amendment rights executed at, or near, the end of his interrogation did not satisfy the state's burden of proving by a preponderance of the evidence a knowing and intelligent waiver of his right to remain silent in the face of other circumstances surrounding the interrogation which supported a finding of no valid waiver. A thorough review of the evidence before the Connecticut Supreme Court clearly demonstrates that its decision was consistent with the principles set forth by this Court in North Carolina v. Butler, 441 U.S. 369 (1979).

B. The Evidence Presented At the Suppression Hearing

Although only the respondent's alleged statement to Lieutenant Laufer was the confession at issue in this case, placing in proper context the evidence directly pertaining to it requires reference to the circumstances surrounding the respondent's alleged earlier statement to Officer Higgins.

On April 3, 1977 at 7:30 a.m., Officer Paula Higgins interrogated the respondent at the crime prevention bureau of the Springfield police department. (Pet. App. at 4A-5A).[1] At the suppression hearing Higgins testified that she had advised

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1. As used herein, "(Pet. App.)" will refer to the petitioner's appendix, "(Pet.)" will refer to the petition and "(Resp. App.)" will refer to the respondent's appendix.

the respondent of his rights and that the respondent had informed her that he was "familiar with his rights" and that he "wanted to talk, anyway." (Pet. App. at 5A). This interrogation lasted approximately forty-five minutes. (Pet. App. at 5A). Higgins' fellow officer, Seymour, subsequently forged the respondent's signature on a copy of this statement. (Pet. App. at 6A).

The trial court granted the respondent's motion to suppress the statement to Higgins. (Pet. App. at 4A). The trial court's ruling was issued in a written memorandum of decision. (Resp. App. at 1A). In its memorandum the trial court concluded that tne defendant had been advised of his "Miranda rights." (Resp. App. at 1A). The trial court further concluded, however, that the evidence did not satisfy it that the respondent had voluntarily and knowingly waived his rights. (Resp. App. at 1A). The petitioner has never challenged this ruling. (Pet. at 2).

Approximately eleven hours after Higgins' interrogation, while he was still in custody at the Springfield police station, the respondent was interrogated by Lieutenant Laufer of the East Windsor, Connecticut police department. (Pet. App. at 6A). At that time Laufer was aware that Higgins had already obtained a statement from the respondent and he was aware that the substance of that statement concerned the crime he was investigating. (Pet. App. at 6A). The form on which the respondent's alleged statement to Laufer was written includes, on the top of the first page, an advisement of rights section with a statement of waiver. (Pet. App. at 11A; Resp. App. at 2A). When Laufer had taken statements from the victims in this case on similar forms, those witnesses had been asked to initial these advisements. (7/7/82 T. at 185-86). On Exhibit P, however, these advisements were

inexplicably left blank. (Resp. App. at 2A). Under the waiver section in Exhibit P Laufer signed his name as a purported witness to the nonexistent signature of the respondent which would have appropriately been placed on the line designated for such a signature. (Resp. App. at 2A). On each of the three pages of Exhibit P Laufer signed his name adjacent to the phrase, "Subscribed and sworn to before me" and marked an "X" in apparent reference to where he wanted the respondent's signature to be placed. (Resp. App. at 2A-4A). The respondent's signature appears nowhere on Exhibit P. (Resp. App. at 2A-4A).

The separate and unattached waiver form, Exhibit O, "clearly relied upon by the [petitioner] as evidence for its claim of waiver"; (Pet. App. at 12A); is dated "4-2-77" and was signed at 6:42 p.m." (Pet. App. at 11A-12A). Although the trial court concluded that the error in the date was a mere "clerical error"; (Pet. App. at 12A); it is clear that the form was signed by the respondent twelve minutes into the interrogation. (Pet. App. at 7A). Laufer testified that the written waiver was executed at 6:42 p.m. because Higgins had previously left the area and was not available to witness the waiver. (Pet. App. at 7A). When Higgins returned, and witnessed the waiver, "the statement was being concluded." (Pet. App. at 12A).

C. The Decision Of The Supreme Court Of Connecticut

In several material respects the petitioner has distorted the factual basis for the opinion of the Connecticut Supreme Court. Although it is true that the opinion contained a summation of the testimony of Officer Higgins; (Pet. App. at 4A-5A); contrary to the petitioner's representation; (see Pet. at 2); neither

the majority opinion nor the dissenting opinion below relied on Higgins' testimony that, after the defendant had informed her that he was "familiar with his rights," he indicated that he "wanted to talk, anyway." (Pet. at 2; Pet. App. at 19A-22A). In fact, in view of a) the trial court's finding that the respondent had been read his rights prior to giving a written statement to Higgins and b) its conclusion that the state had not demonstrated a sufficient waiver prior to such statement (Pet. at 2; Pet. App. at 6A; Resp. App. at 1A), the trial court had implicitly but necessarily found that Higgins' testimony that the respondent had said he "wanted to talk, anyway," was not credible. The petitioner's attempt to incorporate this evidence into the holding of the Connecticut Supreme Court's decision is, simply, misleading. (See Pet. at 1-2). The petitioner has also incorporated into its version of the holding below; (Pet. at 1, 3); the petitioner's testimony that he "didn't mind talking about any credit cards." (See Pet. App. at 21A). As used by the petitioner, this testimony has been taken out of context. The respondent had expressed a willingness to discuss the limited subject of his knowledge of the use of stolen credit cards to purchase gasoline for his car and, according to his testimony, signed the waiver form for that limited purpose. (Resp. App. at 5A-7A). At no time did the respondent testify that he had professed a willingness to discuss the Ramada Inn robbery.

The petitioner has also noted that Laufer testified that the respondent had "acknowledged his rights and waivers prior to the signature" on the waiver form. (Pet. at 3 n.3). At the suppression hearing the petitioner did not attempt to have Laufer explain what he meant by this testimony. Furthermore, he never specified, in relation to the statement, when this "acknowledgment" took place.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS IN ACCORD WITH NORTH CAROLINA v. BUTLER

Because of the petitioner's reliance on a distorted view of the evidence upon which the Connecticut Supreme Court based its decision in this case, the petitioner's arguments in support of granting the writ are, understandably, misguided.

One faulty premise for the petitioner's arguments is that in the absence of the evidence of the belatedly signed written waiver, the petitioner had met its burden of proving a valid implicit waiver. Such was hardly the case. When viewed in light of the following facts and reasonable inferences supported by the evidence produced at the suppression hearing, the petitioner's assertion that "[l]ittle dispute can exist" that there had been a valid implicit waiver; (Pet. at 5); is, to say the least, unreasonable:

1. The respondent refused to sign his statement to Laufer (Resp. App. at 2A-4A; Pet. App. at 7A);
2. Although Laufer had had the victims initial the advisements on the first page of each of their statements (7/7/82 T. at 185-86); he had been unsuccessful in getting the respondent to do the same on his statement (Resp. App. at 2A; Pet. App. at 11A);
3. Laufer's signature as a witness to the written waiver on the first page of the statement (Resp. App. 2A) reflected his unsuccessful attempt to have the respondent execute a written waiver in regard to the discussion of the subject matter of the statement;

4. Laufer's interrogation concerned the same subject matter on which the respondent, only eleven hours earlier, had not waived his right to remain silent. (Resp.App. 1A; Pet. App. at 11A); and

5. The respondent had remained in custody between the time of his arrest and the time of his statement to Laufer. (Pet. App. at 11A).

In regard to the written waiver the petitioner failed to produce evidence as to why, if in fact the respondent had wished to waive his rights in regard to the contents of the statement to Laufer, he did not sign the waiver on the statement itself (Resp. App. at 2A) but instead signed a waiver in a separate and unattached document. (Pet. App. at 11A). The petitioner's speculation that "the delay in signing the waiver form occur[red] as a result of a valid police concern for the presence of an additional witness to the signature"; (Pet. at 6); fails to explain why the waiver form was not executed at the start of Laufer's interrogation when Higgins, ultimately the "additional witness to the signature," was present.[2] In short, no reasonable explanation was ever offered by the state's witness as to why the written waiver was not executed at the start of the interrogation.

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2. At the suppression hearing Higgins had testified:

> I was there when he started talking to Mr. Gray, when he advised him of his rights. I recall seeing him start to explain it, draw the map. I was called away. And I know that I came back after he was writing, and I can remember him writing the end of the statement, "Do you realize, or I know that there's a penalty for giving a false statement to a police officer," I was there for that part.

(7/7/82 T. at 127).

It is against this backdrop of unexplained suspicious circumstances that the petitioner argues that a valid waiver is apparent.

The issue in this case is not, as the petitioner frames it, "whether the late signing of a waiver form can destroy an otherwise valid waiver"; (Pet. at 5); but, whether a written waiver executed belatedly under suspicious circumstances will inevitably compel a finding of a valid waiver where other circumstances suggest no such waiver. As the petitioner has acknowledged, in North Carolina v. Butler, 441 U.S. 369, 373 (1979), this Court noted that "[a]n express waiver or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably ... sufficient to establish waiver. (Pet. at 5). (Emphasis added). Obviously, no more can be expected from the peculiar written waiver in this case.

A review of the decision below clearly reveals its consistency with this Court's opinion in Butler. Unlike the opinion of the North Carolina Supreme Court before this Court in Butler, the decision below did not apply an inflexible rule requiring a valid waiver to be explicit. Citing Butler, the Connecticut Supreme Court recognized that the issue was whether "the defendant knowingly and intelligently waived his constitutional right to remain silent.'" (Pet. app. at 11A). As this Court had done in Butler, supra at 374-75, the decision below noted that, in regard to the issue of waiver, a reviewing court "must look to 'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'"(Pet. App. at 11A, citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Indeed, the Connecticut Supreme Court noted: "The defendant's signature on the separate waiver form is a relevant, but not controlling, factor

in determining the validity of a waiver." (Pet. App. at 12A); see North Carolina v. Butler, supra at 373. Furthermore, far from requiring evidence of an explicit waiver, the Connecticut Supreme Court identified the object of its search in the record as "'affirmative conduct [by the defendant] indicative of a knowingly and intelligently made decision not to remain silent.'" (Pet. App. at 12A). (Emphasis added).

The petitioner has extracted from the opinion below the court's reference to its finding of "less than tolerable treatment of constitutional safeguards" (Pet. App. at 12A; Pet. at 6) and unjustifiably assumes that the court was referring to the Springfield officer's supposed "subterfuge" in forging the respondent's signature on the suppressed statement. It is clear from the opinion, however, that the court was not referring to that conduct but rather to the circumstances surrounding the waiver executed at or near the conclusion of the statement to Laufer. (See Pet. App. at 12A-13A). The petitioner's assertion that "a finding of involuntary Miranda waiver [for the suppressed statement] does not in any way impair the admissibility of the respondent's second confession"; (Pet. at 6); is an overbroad characterization of this Court's holding in Oregon v. Elstad, 105 S.Ct. 1285 (1985). In Elstad this Court found that a confession obtained after a valid waiver did not have to be suppressed under the theory that it had been inevitably tainted by an earlier voluntary but unwarned admission. In the decision below in the instant case the court stated: "It must also be remembered that the defendant ... had already been questioned by Higgins about the same robbery and that the trial court found that he had not waived his rights at that time." (Pet. App. at 11A). This Court's decision in

Elstad certainly did not preclude the court below from considering, as one relevant factor pertaining to waiver, the absence of waiver by the petitioner only hours earlier during an interrogation on the same topic. The court below did not utilize the "taint" theory which the Oregon Court of Appeals had employed in Elstad. See 105 S.Ct. at 1289. The petitioner also asserts that "the fact that Lieutenant Laufer purported to witness the respondent's signature to the second confession when the respondent had not in fact signed also has no bearing on the validity of the second confession." (Pet. at 6). Obviously, a suspect's refusal to put his signature anywhere on a statement which includes, on the first page, a waiver of rights section, is relevant to the issue of whether he wished to waive his rights. (See Resp. App. at 2A).

In concluding that the petitioner had failed to prove, by a preponderance of the evidence, that the respondent had knowingly and intelligently waived his constitutional right to remain silent, the Connecticut Supreme Court properly applied the principles established by this Court pertaining to the issue of a valid waiver of a suspects's fifth amendment rights.

CONCLUSION

The writ should be denied.

CHARLES M. GRAY
RESPONDENT

BY _____

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Counsel for Respondent

With Whom, On The Brief Was:

Joseph G. Bruckmann

No. 86-448

IN THE
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OCTOBER TERM, 1986

STATE OF CONNECTICUT,
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v.

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Respondent

RESPONDENT'S APPENDIX

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TRIAL COURT'S MEMORANDUM OF DECISION
ON MOTION TO SUPPRESS
(RE: STATEMENT TO HIGGINS)

NO. 48449	SUPERIOR COURT
STATE OF CONNECTICUT	JUDICIAL DISTRICT HARTFORD-NEW BRITAIN
VS.	at HARTFORD
CHARLES M. GRAY	JULY 22, 1982

MEMORANDUM OF DECISION
MOTION TO SUPPRESS

The defendant objected to the admission of an alleged statement offered by the state, Exh L, for identification. An evidentiary hearing was held and as a result the court concluded that the statement was taken while the accused was in lawful custody having been arrested by a warrant supported by probable cause. While in custody he was read his Miranda rights before the statement was typed, however, some question arises as to whether he voluntarily and knowingly waived his rights.

The defendant's testimony did not impress the court as entirely credibile, but rather was largely tainted by gross exaggeration as to physical abuse and deprivation. The court did conclude, however, that the accused's position that he did not waive his rights is bolstered by testimony of Officer Higgins, that he did not consent or agree to talk about their (the Springfield) case. The evidence left sufficient questions unanswered so as to compel the court to include that the state has failed to sustain its burden of proof by a fair preponderance of the evidence and accordingly the motion to suppress must be sustained.

/s/ ODonnell, J., ,J.
O'Donnell, J.

TRIAL EXHIBIT P (STATEMENT TO LAUFER)

Subscribed & sworn to before me on 4-3-77 Springfield man (P.D) S. Laufer

Case No. 77-03411 EAST WINDSOR POLICE DEPARTMENT Page 1 of 1 Pages
waiver

STATE OF CONNECTICUT
ss East Windsor
COUNTY OF HARTFORD

Date 4-3-77
Time Started 6:30 Pm
Time Completed 6:50 Pm

I, [illegible] of [illegible] (Address)

Age [illegible] DOB [illegible] (Month, day, year) No Phone (Phone Number)

I have been advised that:

(1) I have the right to remain silent. _____
(2) If I talk to any Police Officer, anything I say can and will be used against me in court. _____
(3) I have the right to consult a lawyer before I answer any questions and I may have a lawyer with me during questioning. _____
(4) I have the right to have a lawyer appointed for me, if I cannot afford one, before I answer any questions. _____
(5) I know that if I answer questions, I have the right to stop answering at any time. _____
(6) I may stop answering questions at any time if I wish to talk to a lawyer, and I may have him with me during any further questioning. _____

I am willing to answer questions and make a statement knowing that I have these rights. I do not want a lawyer; I know and understand what I am doing. I do this freely and voluntarily, and no threats or promises have been made to me.

Witnessed: [illegible] Signature: _____

STATEMENT

[illegible] Wednesday night I went to [illegible] Tavern with [illegible] and Laufer. [illegible] When [illegible] Tavern I walked around by myself [illegible] I went to make a phone call or about the same time I think on a Friday night, I drove down to Windsor Locks in my car, a 1974 Mercury Cougar with license registration 745 965. In the car was a Mike [illegible] or something like that [illegible] was called "Eyeball" I think Eyeball lives [illegible]

X

Continued statement of Charles Gregg Page 2 of 2

[illegible] Place on Springfield Street, Mass. It is about 1:2 about
2 [illegible] and between Springfield & Chicopee [illegible]
off [illegible] Mass. [illegible] Charles [illegible]
[illegible] Mass. [illegible] We drove to the Ramada
Inn off of [illegible], parked the car on the side. We
[illegible] with [illegible] and [illegible] off [illegible]
[illegible] Mass. [illegible] came out. Englund
[illegible] full [illegible] same one that was out
of [illegible] Mass. [illegible] at [illegible] Mike Lund
[illegible] I [illegible] and Charlie was [illegible]
[illegible] the next was [illegible]. We talked about taking the
[illegible] off the alternator of 1-29-77 or there about. While
[illegible] we [illegible] in the building at Ramada Inn or about
Jan 29, 1977, I stayed in the car to be a look out.
I waited about 40 mins, they came back with a
bag. Englund said we didn't get a change to get all
the money, someone was in the room with Gina. When
they came out of the Inn, Englund pulled his hat
band, part of an overall jacket - he had the mask on
top of his head & took it off, Crump had a bag,
I'm sure what was in it. They gave me $11.00 of
what they got. We left & came back to Springfield,
Mass. Crump sold some credit cards to Charles
Cotton. One of the cards Crump sold to Cotton,
Cotton had used to put gas in my car a couple of

Subscribed and sworn to before me at Springfield Mass this 3 day of April
1977

[illegible]

- 3A -

Continued statement of Charles Coney Page 3 of 3

Jump after the Ramada Inn Robbery, this would have been some time around Jan 21, 1977 at a BP gas station on St Jo. in Ave Springfield. This was a credit card in the name of Roger Williams.

The above statement is true & correct. I understand that the gave a false statement to a police officer in order to mislead him in his investigation a crime & I could be arrested for same. I have read this statement & will appear in court as a witness if called.

X

Note: Suspect would not sign statement, he did swear under oath to this officer that it was true.

Subscribed and sworn to before me at Springfield, Mass this 3 day of April 1977

X

EXCERPTS FROM THE RESPONDENT'S
SUPPRESSION HEARING TESTIMONY
(TRANSCRIPT DATED JULY 7, 1982)

* * *

Q Did you see [Laufer] again on the 2nd, which would be Sunday?

A Right, that's on Sunday evening.

Q What time?

A Oh, it had to be around 7:00, just for a few minutes. He, like, walked in, and then he immediately walked out. And then I saw him again the following morning, and he said before he asked me questions concerning these credit cards, I had to sign a waiver, you know, to be able to talk to him. And I told him I didn't mind talking about any credit cards, because I didn't know. He asked me, he want to know who used the card. And at that time, I signed the waiver of my rights, while I being there, talking to him, specifically about credit cards. He did not ask me anything--

Q This was Laufer?

A He did not ask me anything was I involved in any other kind of crimes, besides the credit cards.

Q I see. Who was present when you signed this waiver, or this paper, or--

A I think--

Q --Laufer?

[p. 28]

A --Detective Higgins.

Q Now, that would be Sunday morning, to the best of your recollection?

A Patrolman Higgins.

Q That was a Sunday morning?

A Yes, sir.

* * *

[p. 29]

* * *

Q When you first saw [Laufer], did you sign something for him?

A I remember signing a paper from him that morning, before day.

Q The next day, in the morning?

A Yes, sir.

Q The 3rd?

A Yes, sir.

Q Sometime, though, you recall, in the morning?

A The morning before day, yes, sir. He said he wanted to question me about credit cards.

Q Did he advise you of your rights?

A He told me that I didn't have to talk to him, and he showed me a piece of paper. He said it was an affidavit. He said, "Before I can talk to you, you have to sign this, for only the limited purpose of me asking you about, you know, the credit cards." He said he wanted it to be legit, and then, that's when I volunteered, and signed the paper.

Q You did. Did you give him a statement, also?

A No, sir, I didn't give him, a statement.

Q Never told him anything?

A No, sir. The only thing I told him is that I didn't have anything to do with the credit cards, and I didn't know stolen credit cards had been used to purchase gas for my automobile.

Q Before you said anything to him, you signed that paper. Is that right?

A Beg your pardon?

Q Before you said anything to him, you signed the paper for Lieutenant Laufer; is that right?

A Yes, sir.

* * *

[p. 51]